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### **UNITED STATES' COMMENTS ON THE MONTANA WATER COURT'S PROPOSED WATER RIGHT ADJUDICATION RULES**

The United States submits the following in response to the Court's request for comments on the Montana Water Court's October 2004 Proposed Water Court Adjudication Rules ("2004 Proposed Rules"). We appreciate your interest in comments from parties whose interests may be affected by the efforts of your office to refine and improve the Water Right Adjudication Rules. The U.S. Department of Justice and other federal agencies are appearing in proceedings before the Montana Water Court pursuant to the McCarran Amendment, 43 U.S.C. §666. The United States is submitting its comments on the Proposed Water Rights Adjudication Rules at the request of the Court in order to promote the efficient conduct of public business.

This is the second version of these rules released for public comment. The United States submitted two earlier sets of comments: First, on November 17, 2000, the United States responded to Chief Water Judge C. Bruce Loble's request for comment regarding three specific issues that the 1999 Montana Senate Judiciary Committee requested the Water Court to consider: 1. the Water Court's "on motion" policy; 2. the Water Court's review of settlement documents; and 3. the Water Court's use of Montana Department of Natural Resources and Conservation (Department) personnel. Second, on July 8, 2002, the United States responded to the Court's request for comment on the first Proposed Water Right Adjudication Rules, which, in part, addressed the three Judiciary Committee issues. The United States adopts its earlier comments by reference and offers the following additional comments.

As a general matter, it may be helpful for all parties involved in the adjudication if the Water Court identifies more specifically the new procedures it adopts and the established procedures it intends to continue. In particular, parties may find helpful more detail regarding the Court's explanation of its procedures for: enforcement projects; fish, wildlife and recreation claims adjudications after the Bean Lake III decision; Water Court direction to the Department on its claims examination, including issue remarks and related public notice of these directions; and determining the ownership of water rights. In addition, the rationale is unclear for what appears to be deletions or significant alterations of certain established procedures, such as: deleting the entire rule on field investigations (existing Rule 6.XIV.); narrowing the admissibility of the Department claims

examination materials (deletion of the second paragraph of Rule 1.II.); and deleting the standard of review governing the Chief Water Judge's review of Master's Reports (Rule 1.II(22)). Finally, the 2004 Proposed Rules could be clarified and shortened by: omitting sections that quote a statute at length (e.g., second paragraph of Rule 1.II (13) restates M.R.C.P.); organizing the rules by the order of the adjudication process (e.g., Purpose, Definitions, Claims Examination, Water Court Adjudication, Post-Decree Changes); removing use of the passive voice where the context is unclear (e.g. Rule 2.II.(1)(a)); and determining if various lists within a rule require the addition of "and" or "or" so that it is clear whether the listing is conjunctive or disjunctive (e.g. Rule 2.IV.(3)).

## **SPECIFIC COMMENTS:**

### **CHAPTER 1 INTRODUCTORY PROVISIONS**

#### **Rule 1.I. Purpose of Rules and Summary of Adjudication Process**

Subsection (3)g.<sup>1</sup> provides that the Water Court will hold a judicial hearing on issues "raised by objection, by these rules, or upon the water court's own motion."

*Comment:* It is not apparent what is meant by the addition of the words "by these rules" in this phrase.

Subsection (5) describes the role of the Rules and the Department of Natural Resources and Conservation.

*Comment:* Greater clarity of the rules could be achieved through the use of the active voice such as: "These water right adjudication rules specify how the Department examines water right claims prior to decree issuance during Montana's general stream adjudication. Throughout the adjudication process, the Department provides technical assistance . . . ."

#### **Rule 1.II. Water Court Procedures**

Subsection (1) - Application of Other Rules.

*Comment:* The second full paragraph, which addresses the admissibility of Department data, reports and other written information is deleted. Some of this language is moved to subsection (15) of this Rule. The net result of the two changes appears to narrow the admissibility of Department claims examination data and information. The purpose for such a change is not apparent given the relative value of the Department's claims examination data.

Subsection (4) - Preliminary, Temporary Preliminary, or other Interlocutory Decree.

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<sup>1</sup> The Rule numbers and subsection being referenced correspond to the numbering of the Proposed Rules.

*Comment:* It seem that unnecessary confusion is added through the term “interlocutory decree” in a phrase with “temporary preliminary decree” and “preliminary decree.” Any additional meaning of “interlocutory decree” could be stated in the Definitions section. Some of our reviewers were unsure if the Court’s ability to order a temporary preliminary decree to constitute a preliminary decree, if amended, would offer sufficient notice and opportunity to object to changes made based on other parties’ objections.

Subsection (5)b. - Procedures for Filing Objections to Preliminary, Temporary Preliminary or Interlocutory Decrees.

*Comment:* This paragraph adds a requirement that an objector include on the objection form “any changes the objector believes should be made to the claim.” The current rule sensibly requires the objector to state only the reasons for objecting. At the time objections are filed, parties usually do not know all the changes that should be made and could offer little in the way of specific changes until after the completion of discovery.

Subsection (6)a. - Notice of the Filing of an Objection and Opportunity to File Counterobjections.

*Comment:* The United States has the same comment as to (5)(b) above for the filing of Counterobjections.

Subsection (8) - Wildlife, Fish and Wildlife, and Recreation Claims Hearings.

*Comment:* Our overall concern is that wildlife, fish and wildlife, and recreation claims should not receive a lesser standard of *prima facie* validity than any other claim for an existing right. This concern would appear to be met if the Water Court conducts hearings on wildlife, fish and wildlife, and recreation claims if necessary to resolve objections or, in the absence of objections, only as necessary to resolve a Department’s issue remark.

Subsection (9) - Issue Remarks.

*Comment:* It is sensible to have the Water Court resolve all issue remarks not otherwise resolved during the objection process for a decree prior to the entry of a final decree. Of critical importance to the adjudication process, however, is the continued vitality of the Department’s claims examinations and the inclusion of Issue Remarks for the benefit of the Court and the other parties to the Adjudication. Any changes in the Department’s role or Claims Examination Manual are of great importance to all participants in the adjudication. Therefore, the United States would be very concerned if any Department change to its manual was not subject to the Montana Administrative Procedures Act and subject to public notice and comment.

Subsection (10)a.i., and (10)b. - Review of Claims Under Rule 1.II. (7), (8), and (9).

*Comment:* If the Water Court requires the claimant to confer directly with the Department

in an effort to resolve any issues identified by the Water Court, the United States is concerned that all parties to the claim (objectors, counterobjectors, intervenors) receive notice. If the resolution enlarges the water right or otherwise affects another water right, the Court should give notice to all affected water users and parties to the claim. The same principle should apply if the Water Court confers directly with the claimant.

Subsection (13) - Masters.

*Comment:* The second full paragraph is a restatement of Rule 53(c) of the Montana Rules of Civil Procedure and would appear unnecessary. The standard of review applicable to the Water Court's review of the Master's report is deleted. Does this mean that the "clearly erroneous" standard in Rule 53(e) of the Mont. R. Civ. P. will continue to apply to the Chief Water Judge's review of the Master's reports findings of fact?

Subsection (14) - Department Assistance.

Subsection (14)a.ii. - Requests for Assistance.

*Comment:* What is the difference between an on-site visit and a field investigation? The term "field investigation" is defined in the Definitions section, but the term "on-site visit" is not. When would the Department conduct an on-site visit as a result of a Water Court request for assistance, as opposed conducting a field investigation as described in Rule 2.II (14)b.?

Subsection (14)b. - Field Investigations. (See also deleted Rule 6.XIV).

*Comment:* Why do the 2004 Proposed Rules propose that the Department not conduct field investigations as part of claims examination but do so only when requested by the Water Court after it has issued a decree? In order to facilitate the ability of the department to assist the adjudication by reasonably and accurately determining the extent of water rights, this rule could be modified to allow for a field investigation even if the claimant or claimant's representative is not in attendance, and further modified to allow for equal participation by all attendees at a field investigation. The words "for the purpose of observing" could be removed as unnecessary from the sentence that reads: "The other persons on the Water Court service list may attend for the purpose of observing the Department's field investigation."

Subsection (15) - Admissibility of Department Data.

*Comment:* See comments on Rule 1.II. (1) above.

Subsection (18) - Settlement Conferences and Mediation.

*Comment:* This proposed rule raises issues of concern for parties, such as the United States, who must consider a variety of legal and policy constraints that may bar their participation in

Court-ordered mediation or bar them being ordered to pay an outside Mediator. See, e.g. 43 U.S.C. §666, the McCarran Amendment's limitation on the assessment of costs and fees. Nevertheless, it is the policy of the United States to pursue, participate in and contribute towards the costs of mediation when and where possible and appropriate. If this requirement is interpreted to allow the United States to operate within its legal and policy constraints, we think the Court's objectives can still be met.

Subsection (22) - Burden of Proof and Standard of Review.

*Comment:* Despite the heading, it does not appear to us that this section addresses the standard of review. This section states that a prima facie claim may be "contradicted and overcome by other evidence" and that whoever carries the assertion of change has the burden of proof. But it is unclear from this section what standard of review ("preponderance of the evidence," "clear and convincing evidence," etc.) the proof must meet to overcome the original claim.

Subsection (23) - Settlements.

*Comment:* This section is unclear as to what the applicable standard is that a party must meet to prove that a claim should be enlarged beyond the original claim.

*Comment:* The third sentence of the third paragraph of this section reads, "The water court may accept a claimant's requested reduction or limitation without further presentation of evidence." It appears that the following language should be added to that sentence: "... unless there is an unresolved issue remark on the claim, in which case Rule 2.II.(9), *supra*, applies." The word "provided" in the last sentence of (23) should be changed to "provide."

Subsection (24) - Master's Report.

*Comment:* This section does not appear to identify the standard for the Chief Water Judge's review of findings of fact and conclusions of law in a Master's Report.

Subsection (31)c.iv. and v. - Water Court Decree Enforcement.

This section provides:

- iv. note any point of diversion discrepancies or other significant issues with the potential to directly impact correct distribution of water; and
- v. notify the claimant or other water users of these discrepancies. These discrepancies may be corrected through any procedures discussed in these rules.

*Comment:* It is unclear what is meant by "discrepancies" and "significant issues". It is preferable that the Water Court and the Department address discrepancies and significant issues during the normal adjudication process, not afterwards when it is time to enforce a decree. What are

the procedures in the rules that can be used to correct “discrepancies”? Rule 6.II. addresses “clarifications” and Rule 6.III. addresses “amendments.” Are these the procedures that the Water Court and claimants will use to make corrections for the enforcement project? What notice procedures will be used to ensure that water users in the basin have notice of changes?

Subsection (31)c.v. and (31)f. – Water Decree Enforcement.

*Comment:* It is unclear what is meant by “any other requirement for the successful distribution of water under the water court decree” in subsection (31)c.v. and (31)f.

**Rule 1.III. Definitions.**

*Comment:* The definitions would be easier to reference if this Section was located near the beginning of the rules, perhaps immediately after the current Rule 1.I. The first words in draft Rule 1.III., “Unless the context requires otherwise,” are confusing and might best be deleted. Definitions for “interlocutory decree,” “on-site visit,” and “historical right” should be added.

Subsection (5) - defines “Animal Unit”

*Comment:* In order to eliminate any uncertainty about the standards for non-specified livestock, “Animal Unit” could be changed to read: “‘Animal Unit’ is a measurement of livestock numbers. One cow and calf pair is one animal unit, three pigs are one animal unit, five sheep are one animal unit and one horse is 1.5 animal units.” If other animal units are defined elsewhere they should be referenced.

Subsection (13) - defines “Claimant.”

*Comment:* This definition should include “Tribe.”

Subsection (43) – defines “Non-consumptive.”

*Comment:* Definitions in the basin closure statutes (85-2-340 and 85-2-342, for example) include the phrase, “. . . and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.” It would be clearer to use language consistent with the statutory scheme rather than to create ambiguity or uncertainty with new and somewhat inconsistent terms.

Subsection (52) – defines “Priority Date.”

*Comment:* Add at the beginning of the definition: “For water rights other than reserved water rights. . . .”

**Rule 1.VI. Format of the Department’s Summary Report**

Subsection (1)(a)(vi) - The abstract part of the Department's Summary Report is to include "type of historical right."

*Comment:* It does not appear that the term "Historical right" is defined. In order to clarify what is meant by this provision, it could be amended to define 'historical right' to be a term reflective of the basis or history of the water right as either a decreed right, use right, filed right or reserved right. See Claims Examination Manual at page 256.

## **Chapter 2 IRRIGATION CLAIM**

### **Rule 2.I. Purpose.**

Subsection (2) pertains to situations in which the purpose of the water right cannot be substantiated.

*Comment:* The 2004 Proposed Rules remove the Department's ability to do a field investigation as part of claim examination. The Department may conduct an on-site visit (which is undefined), but only if the claimant invites the Department. This change severely limits the Department's ability to investigate questionable claims thoroughly. As previously noted, in order to facilitate the ability of the department to assist the adjudication by reasonably and accurately determining the extent of water rights, the rules could be modified to allow for a field investigation on a less restrictive basis.

*Comment:* Most sub-sections in Chapters 2-5 direct the Department to put remarks concerning unresolved issues ("issue remarks") on the abstract of claim in the Summary Report. The listing of issues to be remarked should either be more inclusive or should explain what will dictate the Department's decision regarding remarks. Currently, the parameters of issue remarks are identified in the Department's Claims Examination Manual. Changes to these should be only through public notice and opportunity to comment. One possible change to the language regarding issue remarks, found throughout these chapters, and exemplified by Rule 2. I. (5)(e), follows:

"remarks concerning unresolved issues or questions about the claimed purpose should address, at a minimum, the following situations. . . ."

### **Rule 2.II. Owner Name and Address**

Subsection (1)(a) provides that "The name and address given for all water right claims belonging to each claimant in a basin will be reviewed. Discrepancies will be identified by comparing the claimant's name and address with information on record with the Department's centralized record system, telephone directories, other sources, and if necessary, claimant contact data."

*Comment:* It is our understanding that prior to the first status conference in a case, at least one Water Master checks the ownership of land within the claimed place of use and provides an

invitation to any owner, not named on the water right, to participate in the case. This seems to be a reasonable way to ensure that all possible owners are included at the outset in the Water Court's adjudication of a claim. At some point early in the adjudication process, however, the Court should identify the owners and not add additional owners at a later time without a transfer of ownership document. The Water Court could more clearly address this issue by incorporating rules regarding this issue into the Proposed Water Right Adjudication Rules.

Subsection (3)(d) [regarding abstract contents.]

*Comment:* We suggest that this provision could be changed to read:

“remarks concerning unresolved issues or questions about the owner name and address such as the following situations:

- (i) the claim form has not been signed or notarized; or
- (ii) the new owner has been identified but no ownership update has been filed.”

Subsection (4) – The subsection requiring the Department to maintain a list of past owners has been deleted in its entirety, which is information that has proven helpful in the adjudication.

*Comment:* The information provided by the deleted subsection has proven helpful in the adjudication in the past. It would be helpful to the parties to the Adjudication if the Water Court retained this subsection and required the Department to maintain a list of past and current owners of each claimed water right.

Rule 2.V. Reservoirs.

Subsections (1)(a) - (f) describe reservoir data.

*Comment:* These elements of a reservoir claim should always be required, not just included “when available.”

Rule 2.VII. Place of Use.

Subsection (1)(b) states that discrepancies in the claimed place of use may require an on-site visit.

*Comment:* This section appears to be inconsistent with other provisions of the rules that provide that the Department cannot require an on-site visit. Under Rule 6.XIII, the Claimant must invite the Department to do an on-site visit. We have previously suggested modifications that would eliminate this potential inconsistency.

Subsection (2)(b) - states that “Acreage differences exceeding the amount defined in Exhibit B will require claimant contact pursuant to Rule 6XIII.”



*Comment:* The United States could find no Exhibit B attached to the Rules or on the Water Court website. Similar language is found in Rule 2. VII. (5)(f)(i).

### **CHAPTER 3 DOMESTIC CLAIM**

#### **Rule 3.III. Flow Rate and Volume**

Subsection (2)(b)(ii) - provides that the volume for domestic uses on lawns can be up to two and one-half acre-feet (up from 2 ac-ft in the previous rules) per acre of lawn and garden or shelter belt up to a reasonable amount for domestic irrigation (generally 5 acres or less).

*Comment:* We are concerned about this increased volume for domestic uses on lawns and gardens and suspect that many other potential objectors will share this concern.

### **CHAPTER 4 STOCKWATER CLAIM**

Rule 4.V. Period of Use: According to this rule, the period of use guideline for stockwater claims is year-round. If no period of use is claimed, the rule provides that the Department will change it to the guideline- i.e. to a year-round period of use.

*Comment:* It is our experience that many stockwater uses, especially those that are diverted from a stream into a ditch system, are not and cannot be used year-round. Thus, it would lead to greater accuracy in the adjudication of water rights if the Court changes the guideline for the period of use for a stockwater claim to the season of irrigation use, unless a claimant has claimed or proven a different period of use. Another alternate suggestion is that the Court consider limiting the period of use dependent on the means of diversion.

### **CHAPTER 5 OTHER USES CLAIM**

#### **Rule 5.IV. Flow Rate and Volume**

Subsection (4) - has the following new language added: "For all instream other uses claims, including claims filed by the Montana Department of Fish, Wildlife and Parks on Murphy Right stream as identified under section 85-9801 R.C.M (1969), the flow rate and volume guidelines will be the minimum amount necessary to sustain the specific purpose using information in the claim and other data gathered by the Department."

*Comment:* No other type of claim is hindered by the condition that it must be the minimum amount necessary for the specified purpose and the condition is required neither by statute nor case law. This condition could be removed for wildlife, fish and wildlife, and recreation claims. This requirement also appears contradicted by Rule 6, which states that the claimed volume/flow rate for Murphy Rights will not be changed.

## CHAPTER 6 GENERAL PROVISIONS

### Rule 6.XIII. Claimant Contact

Subsection (2) has been changed to specify that the Department may conduct on-site visits at the claimant's invitation. See above, Rule 6.XIV.

*Comment:* The rules have been changed to prohibit the Department from doing field investigations or on-site visits, unless it is at the claimant's invitation, during claims examination. The existing rule regarding field investigations, Rule 6.XIV. provides that the Department can only conduct field investigations as part of its claim examination (i.e. before the Water Court issues a decree) when the claimed right appears to be erroneous, exaggerated, or nonexistent and provided notice to the claimant and an opportunity to attend. The claimant also has an opportunity to object to the field investigation. This Rule regarding field investigation is deleted in its entirety in the proposed Water Right Adjudication Rules. It is advantageous for the Department to retain authority to conduct field investigations as part of its claims examination, in accordance with existing Rule 6.XIV. On-site visits would be particularly helpful at the claimant's invitation, pursuant to Water Court order, or when claimant contact has failed to provide adequate documentation or evidence to resolve issues identified by the Department during its claims examination.

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